IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. DAVID ALLEN WATTERS, Petitioner.	)	2 CA-CR 2006-0156-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20033601

Honorable John E. Davis, Judge

REVIEW GRANTED; RELIEF DENIED

David Allen Watters — Yuma
In Propria Persona

H O W A R D, Presiding Judge.

¶1 Pursuant to an agreement, petitioner David Watters pled guilty in CR20033601 to possession of a dangerous drug for sale, a class two felony. The trial court suspended the imposition of sentence in July 2004 and placed Watters on intensive probation for five years on condition he spend twelve months in jail. Pursuant to the agreement, the court also dismissed all charges in CR20033577. Watters apparently later

pled guilty in CR20041965 to forgery and taking the identity of another and was placed on a concurrent, four-year term of probation in August 2004.[1]

¶2 In January 2005, Watters moved to modify his probation conditions, asking to be released from jail early to be placed in a residential substance abuse program. The trial court granted the request, and Watters was released on January 19. Shortly thereafter, the state filed a petition to revoke Watters's probation in both CR20033601 and CR20041965, alleging he had consumed alcohol on January 27 as evidenced by the results of two breath tests. Watters admitted the allegation, and the trial court revoked his probation and sentenced him to a presumptive, five-year prison term in CR20033601, to be followed by concurrent, presumptive, 2.5-year terms in CR20041965. In ordering the sentences in the latter case to be served consecutively to that in the former, the court noted Watters had committed the subsequent offenses while on release in the first offense.

¶3 Watters then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. The trial court dismissed the petition summarily, and this petition for review followed. We review the ruling for an abuse of discretion, *see State v. Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d 149, 150 (App. 2001), and find none.[2]

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[1]Although the notice of post-conviction relief Watters filed listed both cases, the trial court record in CR20041965 was not provided to us.

[2]We reject Watters's request for counsel in this discretionary review proceeding. *See State v. Smith*, 184 Ariz. 456, 460, 910 P.2d 1, 5 (1996).

¶4 In his post-conviction petition, Watters argued the trial court had improperly ordered the sentences to be served consecutively and trial counsel had been ineffective in a number of ways. On review, Watters contends the court abused its discretion in denying relief on his claim that consecutive sentences were improper, pointing out the court originally ordered the probation terms to be served concurrently.

¶5 Contrary to his assertion, however, when the court placed Watters on probation, it did not "conclude[] that, by law, [he] met the criteria for concurrent sentences." When a trial court places a defendant on probation, it suspends the imposition of sentence; it does not impose a sentence. *See* A.R.S. § 13-901(A). Therefore, the court does not consider the provisions of A.R.S. § 13-708 or decide whether to order any future sentences to be served concurrently or consecutively. Moreover, "[i]f the court revokes the defendant's probation and the defendant is serving more than one probationary term concurrently, the court may sentence the person to terms of imprisonment to be served consecutively." § 13-901(C). Accordingly, the court's initial order that Watters serve his probationary terms concurrently did not require it to impose concurrent sentences when Watters violated the conditions of his probation and the court revoked his probationary terms.

¶6 Nor do we agree with Watters that the court's imposition of consecutive sentences constitutes punishment for his failure on probation rather than punishment for the offenses of which he was convicted. Watters is correct that a trial court may not base a

sentence imposed after revocation of probation solely on the defendant's performance on probation. *See State v. Rowe*, 116 Ariz. 283, 284, 569 P.2d 225, 226 (1977) ("A trial judge who revokes probation must impose a sentence because of the original offense; the sentencing court is without authority to impose punishment for violation of probation alone."); *State v. Baum*, 182 Ariz. 138, 140, 893 P.2d 1301, 1303 (App. 1995) (same). But Division One of this court vacated the defendant's sentence in *Baum* because the trial court had found numerous mitigating factors when it placed the defendant on probation and found they outweighed the aggravating factors but had determined beforehand it would impose an aggravated sentence if the defendant violated his probation conditions. 182 Ariz. at 140, 893 P.2d at 1303.

¶7 In these cases, the trial court imposed presumptive prison terms. The court found no aggravating or mitigating circumstances. Its comments about Watters's behavior while committing the offenses and his having violated his probation conditions less than ten days after he was released from jail were made in the context of deciding to revoke Watters's probation, not in deciding the sentences should be consecutive. Finally, Watters is mistaken that his plea agreement promised him concurrent sentences. Although the agreement in CR20041965 is not in the record before us, the agreement in CR20033601 does not mention any other case besides CR20033577, which was dismissed, nor does it address concurrent or consecutive sentences. We find no abuse of discretion in the court's imposition of

consecutive sentences nor in its refusal to grant post-conviction relief on Watters's challenge to the consecutive sentences.

¶8 We do not address Watters's arguments about trial counsel's ineffectiveness in failing to have the weight of the dangerous drug confirmed, in presenting evidence challenging the police officer's probable cause to stop Watters's vehicle, or in advising him to accept the state's plea offer. By pleading guilty to the offense, Watters waived any nonjurisdictional defects. *See State v. Hamilton*, 142 Ariz. 91, 94, 688 P.2d 983, 986 (1984). Therefore, counsel's performance related to the weight of the drug or the officer's stop of Watters's vehicle is irrelevant. And Watters never articulated any specific alleged deficiencies in counsel's advising him to plead guilty or proffered sufficient facts to establish his claim; accordingly, the trial court did not abuse its discretion in ruling he had failed to state a colorable claim for relief on that claim. *See State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (trial court properly summarily denies post-conviction relief on ineffective assistance of counsel claim if defendant fails to show counsel's performance was deficient).

¶9 Watters argues counsel was ineffective in advising him to admit the allegation that he had violated a condition of his probation. He contends counsel promised him he would be reinstated on probation with the requirement that he serve only six months in jail. But he does not assert that he would not otherwise have admitted the allegation or explain how he was prejudiced by having done so. And the relief he seeks is to have this court order

that his sentences be served concurrently. If his admission was involuntary because of counsel's ineffectiveness, however, the appropriate relief would be to allow him to withdraw the admission and to have the allegation tried in a violation hearing; it would not be an order making the sentences concurrent. *See* Ariz. R. Crim. P. 17.5, 16A A.R.S. (if guilty plea is withdrawn to correct manifest injustice, charges against defendant are automatically reinstated); *State v. Flowers*, 159 Ariz. 469, 472, 768 P.2d 201, 204 (App. 1989) (case of defendant whose probation violation admission was involuntarily remanded to permit defendant to withdraw admission).

¶10 Finally, we do not address Watters's claims that counsel was ineffective in failing to argue at the disposition hearing that the consecutive sentences were improper or that he should have been sentenced for a class four felony in CR20033601 because the amount of methamphetamine he possessed did not meet the threshold amount for a class two felony. Watters did not make either claim below. *See State v. Herrera*, 183 Ariz. 642, 648, 905 P.2d 1377, 1383 (App. 1995).

¶11 We grant the petition for review but deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge